

- (1) Did claimant suffer accidental injury on October 7, 1998, to the right shoulder?
- (2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?
- (3) Did claimant provide timely notice of the right shoulder injury, pursuant to K.S.A. 44-520?
- (4) Is claimant entitled to medical treatment for the right shoulder and payment of temporary total disability compensation for both the right shoulder and the thumb?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

FINDINGS OF FACT

Claimant has worked as a truck driver for respondent for approximately five years. On October 7, 1998, while at a job site, claimant climbed onto a road grader in order to obtain a Pepsi from the cooler of the road grader operator. While leaving the road grader, claimant slipped and fell. Claimant alleges he struck his left thumb and injured his right shoulder.

Claimant did not mention the injuries to respondent on the date of accident, but did have a conversation with Phil Smith, the owner of respondent, the next day, October 8, 1998. At that time, claimant alleges he talked to Mr. Smith about the injuries to both the thumb and the shoulder the day before. A former employee of respondent by the name of Ryan Karrick was present at the time of the conversation and recalled claimant mentioning to respondent that he had fallen and injured his thumb. However, Mr. Karrick had no recollection of claimant at any time mentioning his shoulder.

Mr. Smith denies that the conversation took place and denies that he was advised of either the thumb or the shoulder injury. The first notice Mr. Smith acknowledges receiving regarding this claim was in December 1998, when he received a \$60 bill from St. Joseph Hospital for an emergency room visit by claimant on December 7, 1998.

When questioned regarding preexisting problems, claimant acknowledged having broken his left thumb several years earlier. However, claimant denied any prior right shoulder problems. When presented with medical evidence of a rotator cuff injury in 1995, followed by an arthrogram, claimant acknowledged that he did, indeed, have problems with his right shoulder and received treatment through Jay Stanley Jones, M.D., in Wichita, Kansas, in 1995. However, claimant testified that neither the shoulder nor the thumb gave him any difficulties in the year before the October 7, 1998, accident.

Claimant did not seek additional treatment for the thumb or the shoulder until February 12, 1999, when he visited his personal physician, Renae Schuler, M.D. Both the emergency room medical records in December 1998 and Dr. Schuler's records of February 1999 mention the shoulder and the thumb.

The Administrative Law Judge granted claimant benefits for treatment to the thumb, but denied benefits for the shoulder, finding claimant had failed to provide notice of the injury to the right shoulder.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1996 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 44-520 obligates a worker to provide notice of an accident to the employer within 10 days after the date of accident. This notice must state the time and place and particulars of the accident, including the name and address of the person injured. In this instance, claimant advised respondent the day after the accident that he suffered an accidental injury. However, an independent witness to this conversation, Ryan Karrick, heard claimant discuss the thumb injury, but did not hear claimant mention the shoulder injury.

The Appeals Board finds claimant provided notice to respondent on October 8, 1998, of the accident. The Appeals Board also finds that, as claimant's discussion regarding the accidental injury is uncontradicted, claimant has proven accidental injury to his thumb as well. Therefore, the decision by the Administrative Law Judge to grant medical benefits to the claimant for the thumb is affirmed.

With regard to the shoulder, however, claimant has failed to prove that he suffered accidental injury on the date alleged. The claimant's failure to mention the shoulder on the day after the alleged accidental injury is significant. In addition, when asked about preexisting shoulder problems, claimant denied any prior problems. Only upon being presented medical evidence that claimant had suffered a substantial shoulder injury to his rotator cuff in 1995 and undergone an arthrogram, did claimant acknowledge the prior shoulder problems.

The Appeals Board finds claimant has failed to prove accidental injury to his right shoulder and the Administrative Law Judge's denial of benefits for the right shoulder is, therefore, affirmed.

Claimant also appealed regarding claimant's entitlement to medical treatment and payment of temporary total disability compensation. K.S.A. 1997 Supp. 44-551 and K.S.A. 1997 Supp. 44-534a limit a party's right to appeal from a preliminary hearing. The issues

dealing with medical treatment and temporary total disability compensation do not constitute jurisdictional issues appealable under K.S.A. 1997 Supp. 44-534a. In addition, the Administrative Law Judge is specifically empowered to decide these issues at preliminary hearing. Therefore, an appeal of these issues under K.S.A. 1997 Supp. 44-551 would not be proper at this time.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated April 13, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Paul V. Dugan, Jr., Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director